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NO. 03-801

IN THE SUPREME COURT OF THE UNITED STATES

SAM S. REED, SECRETARY OF STATE
OF THE STATE OF WASHINGTON,

Petitioner,

v.

DEMOCRATIC PARTY OF WASHINGTON
STATE; REPUBLICAN STATE COMMITTEE OF
WASHINGTON; LIBERTARIAN PARTY OF
WASHINGTON STATE, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONSE BRIEF OF REPUBLICAN STATE COMMITTEE OF WASHINGTON

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QUESTION PRESENTED

Whether Washington's blanket primary and candidate unilateral self-designation of party affiliation system forces the Republican Party to associate with non-affiliated voters and office-seekers in the process of choosing its nominees for partisan office, contravening the Republican Party's right under the First Amendment to associational and expressive freedom, under *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

TABLE OF CONTENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR DENYING THE PETITION 3

A. The Blanket Primary Systems of Washington and California Are Indistinguishable. 6

1. Washington Misstates the Nature of Its Primary Election Statutes In Asserting That The Blanket Primary Does Not Designate Party Nominees. 6

a. Washington's primary election statutes unequivocally state that party candidates are nominated through the blanket primary. 7

b. Washington's Attorney General has historically taken the position that the blanket primary is the process by which political parties nominate their candidates. 9

2. Washington's Experience With the Blanket Primary Was the Basis for this Court's Reversal of the Ninth Circuit in *Jones*. 10

B. Reed Is Merely the Latest Case Following this Court's Rulings that Political Parties, Not the State, Define the Scope of Their Association and Who May Select Their Nominees. 13

C. Washington State Cases that Directly Conflict with This Court's Constitutional Rulings Are Entitled to No Deference and Provide No Basis for a Writ of Certiorari. 15

CONCLUSION 18

TABLE OF AUTHORITIES

Federal Cases

California Democratic Party v. Jones,
530 U.S. 567 (2000) 3, 5, 10-17

California Democratic Party v. Jones,
984 F. Supp. 1288 (E.D. Cal. 1997) 6, 10-12

Democratic Party of United States v. Wisconsin ex rel. La Follette,
450 U.S. 107 (1981) 5, 13, 14, 16, 17

Democratic Party of Washington v. Reed,
343 F.3d 1198 (9th Cir. 2003) 5, 6, 8, 15, 19

Eu v. San Francisco Democratic Comm.,
489 U.S. 214 (1989) 5, 13

Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 18

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) 5, 13, 15, 17

State Cases

Anderson v. Millikin,
186 Wash. 602, 59 P.2d 295 (1936) 10

Heavey v. Chapman,
93 Wn.2d 700, 611 P.2d 1256 (1980) 15, 16

O'Callaghan v. State,
6 P.3d 728 (Alaska 2000) 17

O'Callaghan v. State,
914 P.2d 1250 (Alaska 1996) 17

State ex rel. La Follette v. Democratic Party,
93 Wis. 2d 473, 287 N.W.2d 519 (1980) 16

State ex rel. Zent v. Nichols,
50 Wash. 508, 97 Pac. 728 (1908) 10

Statutes

R.C.W. 29.01.090 8

R.C.W. 29.15.010 8

R.C.W. 29.18.150 7

R.C.W. 29.18.160 7

R.C.W. 29.18.200 10

R.C.W. 29.24.020 10

R.C.W. 29.30.095 ..... 7, 8

R.C.W. § 29.15.010 1

Constitutional Provisions

U.S. CONST. art. VI, cl. 2 ..... 1, 16

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. VI, cl. 2

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

R.C.W. § 29.15.010

"A candidate who desires to have his or her name printed on the ballot for election to an office other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration and affidavit of candidacy. The secretary of state shall adopt, by rule, a declaration of candidacy form for the office of precinct committee officer and a separate standard form for candidates for all other offices filing under this chapter. Included on the standard form shall be:

(1) A place for the candidate to declare that he or she is a registered voter within the jurisdiction of the office for which he or she is filing, and the address at which he or she is registered;

(2) A place for the candidate to indicate the position for which he or she is filing;

(3) A place for the candidate to indicate a party designation, if applicable;

(4) A place for the candidate to indicate the amount of the filing fee accompanying the declaration of candidacy or for the candidate to indicate that he or she is filing a nominating petition in lieu of the filing fee under R.C.W. 29.15.050;

(5) A place for the candidate to sign the declaration of candidacy, stating that the information provided on the form is true and swearing or affirming that he or she will support the Constitution and laws of the United States and the Constitution and laws of the state of Washington.

In the case of a declaration of candidacy filed electronically, submission of the form constitutes agreement that the information provided with the filing is true, that he or she will support the Constitutions and laws of the United States and the state of Washington, and that he or she agrees to electronic payment of the filing fee established in R.C.W. 29.15.050.

The secretary of state may require any other information on the form he or she deems appropriate to facilitate the filing process."

STATEMENT

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court invalidated California's blanket primary election system as unconstitutionally burdening political parties' First Amendment rights of association and expression. This case turns on whether the First Amendment principles of *Jones* apply with equal force to Washington's blanket primary.

Washington's primary is materially indistinguishable from California's, and its effects served as the basis for this Court concluding that the California primary violated the First Amendment. Washington attempts to distinguish its system from California's by asserting that the blanket primary is not used to nominate party candidates, but rather candidates of the "general electorate." This assertion is proved false by Washington's statutes and its Attorney General's consistent interpretation of the blanket primary from the time the primary was adopted in 1935 until well after litigation commenced in this case.

REASONS FOR DENYING THE PETITION

Washington shows no reason this Court should devote scarce judicial resources to review the Court of Appeals decision. The Ninth Circuit struck down Washington's blanket primary based on this Court's clear statement of First Amendment principles in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). In *Jones*, this Court relied on Washington's experience with its blanket primary in concluding that California's blanket primary invaded the First Amendment rights of political parties and their members. Washington's assertion that

its primary is constitutionally distinguishable is contradicted by the statute itself, the State's contentions as an *amicus curiae* in *Jones*, its stipulations and representations in this case, and its consistent position since the blanket primary was adopted in 1935.

From the outset of this case, Washington recognized that this Court's decision in *Jones* applied to its primary election system.[1] In stipulating to the entry of a preliminary injunction, Washington admitted that "forcing the Parties to select their nominees in the blanket primary called for by existing election statutes violates each Party's First Amendment rights of association and causes the Party and its members irreparable injury." (ER 0070-71) The State further stipulated that an "Authorized Voter" in the Republican primary was one whose "participation in a primary is consistent with the political party's right to determine those who will participate in selecting its nominees, as articulated in" *Jones,* and that "[a] Party's definition remains in effect until changed by the Party." (ER 0069)

The Republican Party adopted rules establishing qualifications for candidates for nomination and primary election voters. (ER 1244-49) After stipulating to the preliminary injunction, however, the State failed to

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[1] Washington has previously represented to this Court that *Jones* had application to the blanket primary generally, which served as the catalyst for Washington's status as an *amicus curiae.* In its *amicus* brief, the State asserted, "The freedom of citizens of Washington . . . to embrace the blanket primary . . . clearly is threatened by the Political Parties' challenge to California's blanket primary." Brief of the States of Washington and Alaska as Amici Curiae in Support of Respondents, LEXIS, *1999 U.S. Briefs 401,* *2.

correct its facially invalid statute. The State chose to burden the Republican Party with three more primary elections under an admittedly unconstitutional system, because it viewed the remedy as unpalatable.[2] When the political parties moved for summary judgment and a permanent injunction in March, 2001, the State still conceded that it could not run a constitutional election under the blanket primary: "This case is . . . not about the constitutionality of the blanket primary; it is about the appropriate remedy." (ER 198, 0392-99)

In the decision below, the Ninth Circuit applied directly controlling precedent of this Court, holding that Washington's primary violated political parties' First Amendment right of association, as did California's blanket primary. *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1203-1206 (9th Cir. 2003). At best, the State's petition for a writ of *certiorari* amounts to an invitation for this Court to reconsider not only its decision in *Jones*, but also the long line of cases upholding the right of political parties to determine whether nonmembers may participate in the selection of party nominees for public office. *See, e.g., Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

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[2] After *Jones* was decided, Washington's attorney general, Christine O. Gregoire, wrote to Washington's governor and secretary of state "regarding the potential for legal challenges" concerning the upcoming primary elections. (ER 0025) Ms. Gregoire opined that *Jones* "does not prohibit the blanket primary unless the political parties choose to *nominate* their candidates by other means." (ER 0026) (emphasis added)

A. The Blanket Primary Systems of Washington and California Are Indistinguishable.

1. Washington Misstates the Nature of Its Primary Election Statutes In Asserting That The Blanket Primary Does Not Designate Party Nominees.

Washington's entire petition is premised on its contention that unlike California, its blanket primary does not "designate party 'nominees' or 'standard bearers' but [rather] winnow[s] the field of candidates who will appear on the general election ballot." Petition at 12. The assertion is false, contradicted by the language of the Washington statutes themselves and the Washington Attorney General's longstanding interpretation of the blanket primary statute.

Washington attempts to buttress its position by claiming that the concept of party "membership" has no relevance to its blanket primary, because the candidates selected in the primary are not party nominees. The district court in *Jones* adopted a similar tack, stating that, in California, "the term 'party member' as applied to registered voters is something of a misnomer." *California Democratic Party v. Jones*, 984 F. Supp. 1288, 1296 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000). Even without addressing the inaccuracy of Washington's contention, the Ninth Circuit observed that the State's argument that the blanket primary prevents a party from picking its nominees "is the problem with the system, not a defense of it." *Reed*, 343 F.3d at 1204.

On the day this case began, the State stipulated that its election statutes required the Republican Party "to select [its] *nominees* through a public primary conducted by the Secretary of State." (ER 0070) (emphasis added) Opposing the Party's motion for a permanent injunction, Washington advised the district court that "a state cannot constitutionally compel political parties to accept a system known as the 'blanket primary' as the method for selecting *partisan nominees*." (ER 0198) (emphasis added) Only later did Washington "discover" that its primary did not nominate the Party's candidates.

a. Washington's primary election statutes unequivocally state that party candidates are nominated through the blanket primary.

Washington statutes make clear that the blanket primary nominates the Republican candidate who will appear on the general election ballot. Only a single candidate for a particular partisan office may bear the Republican name at the general election. *See* R.C.W. 29.30.095. According to R.C.W. 29.18.150, "[s]hould a place on the *ticket* of a major political party be vacant because no person has filed *for nomination as the candidate of that major political party*, . . . the . . . central committee of the . . . political party may select and certify a candidate to fill the vacancy." (emphasis added)

Similarly, R.C.W. 29.18.160 makes express reference to a "*nominee* of a major or minor political party" when filling vacancies occasioned by death or disqualification prior to the election. (emphasis added) The entire ballot access system under Washington election law rests on candidates being party nominees. A

"major political party" is defined as "a political party of which at least one *nominee* for president, vice president, United States senator, or a statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year." R.C.W. 29.01.090 (emphasis added).

Under R.C.W. 29.30.095, "[t]he name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless the candidate receives a number of votes equal to at least one percent of the total number cast for all candidates for that position sought and a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary." There is no question that Washington's blanket primary determined the identity of the Republican nominee in the general election.

The State relies on another part of its statutory scheme, R.C.W. 29.15.010, also declared unconstitutional by the Ninth Circuit, to contrast Washington's and California's blanket primaries. The filing statute, which allows candidates to self-designate their political party, was expressly challenged by the Republican Party as an unconstitutional infringement on the right of association. In denying the Republican Party's request for a permanent injunction, the district court noted that the Republicans sought to enjoin the State from, *inter alia*, "[a]llowing any person other than the authorized candidate of the Republican party to appear on the ballot." (ER 0394) The Ninth Circuit directed that the Party receive its injunctive relief. *Reed*, 343 F.3d at 1207. Washington may not rely on one statutory provision that the Ninth

Circuit held violates the First Amendment (and which it does not challenge here) to justify its invasion of First Amendment rights through its blanket primary.

b. Washington's Attorney General has historically taken the position that the blanket primary is the process by which political parties nominate their candidates.

Two State attorney general opinions further refute Washington's argument that its primary does not select Republican Party nominees. The first, in 1935, immediately following adoption of the blanket primary, was unequivocal in holding that the primary produced party nominees. The Attorney General, discussing the impact of the blanket primary on other election laws, stated that (1) the candidate receiving the most votes among candidates of a particular political party "will be the *nominee of such party*"; and (2) the blanket primary "simply provides a method by which voters can nominate candidates to run as the *nominees of the various parties* at the general election." (ER 1199) (emphasis added)

In the second opinion, in 1956, the Attorney General described three methods "by which a candidate seeking the *party nomination* for an office in a partisan primary may secure such nomination," and utilized the Secretary of State's interpretation of how a "write-in" candidate could "become a *party nominee* for a given partisan office." (ER 1205) (emphasis added) Washington offers no explanation for its abandonment of this longstanding interpretation of its statutes. Nor does the State offer even now an explanation why this Court

should reject the State's contemporaneous construction,[3] consistently followed, in favor of a contrary interpretation adopted mid-litigation.[4]

2. Washington's Experience With the Blanket Primary Was the Basis for this Court's Reversal of the Ninth Circuit in *Jones*.

Much of the evidence presented in this case was also addressed in *Jones*, and underlies this Court's conclusion that the blanket primary harms political parties' First Amendment rights.[5] The district court in *Jones* directly relied on Washington's primary to uphold the California system, using Washington's "half century of experience with a blanket primary" as evidence of what is "likely to occur in California." *Jones*, 984 F. Supp. at 1297 & 1299. The district court viewed the "harms" and

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[3] Even in the initial decision upholding the blanket primary, *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936), the Washington Supreme Court recognized that party nominees are selected in the blanket primary: "[Washington's direct primary law] still stands except as amended or repealed by the 1935 act. . . . *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728 [1908] . . . may well be read in connection with what is said here." 186 Wash. at 605. *State ex rel. Zent* repeatedly refers to candidates selected to advance to the general election as nominees of the parties.

[4] If the State's contention were correct, its statutes would be constitutionally defective, as a minor political party achieving major party status would thereby forfeit its right to define its message to voters. *Compare* R.C.W. 29.24.020 (Petition, App. at 94a) *and* R.C.W. 29.18.200 (Petition, App. at 92a).

[5] Washington's *amicus* brief in *Jones* even represents that the evidence supporting the district court's decision "was drawn from the experience of Washington." LEXIS, *1999 U.S. Briefs 401*, *3.

"benefits" of California's blanket primary through the eyes of Professor David Olson of the University of Washington, whose report was also heavily relied upon by the district court in this case. *Compare Jones*, 984 F. Supp. at 1297-98 & n.24, 1299 & n.27, 1300 & n.29 *with* Petition, App. at 58a, 63a, 66a-67a, & 74a-79a.

In *Jones*, Professor Olson testified that the vast majority of Washington "voters cross over at least once." 984 F. Supp. at 1298 n.24. In this case, he stated "that one-quarter to one-third of voters cast their primary votes within one party column only." (ER 0649) In *Jones*, this Court noted Olson's testimony that "only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot" and concluded that under California's primary, "the prospect of having a party's nominee determined by adherents of an opposing party is far from remote – indeed, it is a clear and present danger." 530 U.S. at 578. The State offers no explanation why cross-over voting by two-thirds to three-quarters of Washington's electorate poses any less "danger" today.[6] A 2000 survey found that only 31% of Washington voters planned to vote a straight Party ticket in the primary. (ER 0390)

California's blanket primary was "the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders." 984 F. Supp. at 1293. Similarly, Washington argues that its blanket primary was conducted "by and for the general electorate." Petition at

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[6] Professor Olson admitted that Washington cross-over voting changed the winner of a party nomination, resulting in Washington having a different governor. (ER 0634:20-24) The State offers no justification for continuing this clear and present danger.

15. Professor Olson admitted that allowing the "general electorate" to participate has produced candidates in Washington who differed philosophically from those chosen by party voters. (ER 0648, 1191) This Court agreed that the "substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from the party faithful," 530 U.S. at 578, and concluded that this invades protected First Amendment rights, even if motivated by "benevolent" intentions. 530 U.S. at 579. Professor Olson testified in this case that Washington's primary dilutes the votes of party identifiers (which was also "likely to occur in California," 984 F. Supp. at 1299), but opined that "it is simply the price to pay for permitting voters to winnow the field of candidates." (ER 1010-1011) This Court recognized that this substantial influx of non-party voters harms the Party's right to select the leaders who will represent it at the general election. 530 U.S. at 578-580.

Washington's primary produces the same unconstitutional message modification as California's. Professor Olson reported that "[b]ecause candidates under the blanket primary have to appeal not only to their own party identifiers, but also to independents and opposite party identifiers, candidates have incentives to craft and offer messages that appeal to the median voter." (ER 0650) This too, *Jones* concluded, is an unconstitutional burden, because candidates will have "prevailed by taking somewhat different positions – and . . . will continue to take somewhat different positions in order to be *re*nominated." 530 U.S. at 580 (emphasis in original).

B. *Reed* Is Merely the Latest Case Following this Court's Rulings that Political Parties, Not the State, Define the Scope of Their Association and Who May Select Their Nominees.

The Court of Appeals decision follows a long line of Supreme Court cases upholding the right of political parties to determine whether nonmembers may participate in the selection of party nominees for public office. *See, e.g., Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Jones*, 530 U.S. at 575 ("Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'") (quoting *Eu*, 489 U.S. at 224).

Unaffiliated and rival party voters are not free to cross party lines to support a particular candidate at the expense of the associational right of political party adherents to select their standard bearer. A "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." 530 U.S. at 583 (quoting *Tashjian*, 479 U.S. at 215-216, n.6). As in California, a "voter's desire to participate does not become more weighty simply because the State [of Washington] supports it." 530 U.S. at 583-84.

In *Jones*, this Court noted that California rested its "defense of the blanket primary upon the proposition that

primaries play an integral role in citizens' selection of public officials. . . . [The blanket primary], respondents conclude, is simply a rather pedestrian example of a State's regulating its system of elections." 530 U.S. at 572. Similarly, Washington contends that because "[t]he primary is not conducted by, for, or through the political parties, but by and for the general electorate," it may force the Party to allow outsiders to define its message and nominees. Petition at 15.

This Court rejected that contention, stating, "[W]hatever the strength of the state interests supporting the open primary itself, they could not justify [a] 'substantial intrusion into the associational freedom of members of the National Party.'" 530 U.S. at 576 (quoting *La Follette*, 450 U.S. at 126). California's blanket primary, Wisconsin's open primary, and Washington's blanket primary all constitute a "state-imposed burden," which is the "intrusion by those with adverse political principles upon the selection of the party's nominee." 530 U.S. at 576 n.7 (internal quotation marks omitted).

Where Democratic Party rules prohibited the participation of nonaffiliated voters in the nomination process for its presidential candidate, and Wisconsin sought to compel the Democratic Party to seat delegates chosen through an open primary, in which voters did not declare their party affiliation, the Party's rules controlled over the inconsistent state statute: "It is for the National Party – and not the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the Party's candidate selection process." *La Follette*, 450 U.S. at 124. Where a Republican Party rule allowed

independent voters to vote in Republican primaries, and Connecticut required voters in any party primary to be registered members of that party, the conflict was resolved in favor of the Party rule: "The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian*, 479 U.S. at 224.

The principles underlying both *La Follette* and *Tashjian* were explicitly adopted by this Court in *Jones*. The selection of a standard bearer by a political party is fundamental to its existence, and a state may not substitute its judgment for that of the political party in determining whether the party's message is advanced by the participation of nonmembers, or not. *See* 530 U.S. at 581-82.

C. Washington State Cases that Directly Conflict with This Court's Constitutional Rulings Are Entitled to No Deference and Provide No Basis for a Writ of Certiorari.

Washington seeks review in part based on an asserted conflict between state supreme court decisions, not only with the Ninth Circuit *Reed* decision, but with this Court's decision in *Jones*. In *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980), the Washington Supreme Court held that forcing political parties to allow unaffiliated voters to select the parties' nominees was not a substantial burden on their associational rights. This Court held that there is "no heavier burden on a political party's associational freedom" than such forced association. *Jones*, 530 U.S. at 582. Washington offers no authority for its assertion that *Heavey* is "entitled to

considerable deference" by this Court. Petition at 19, n.17. It is a fundamental principle of constitutional law that the conflict between *Jones* and *Heavey* must be resolved in favor of this Court's constitutional interpretation. *See* U.S. CONST. art. VI, cl. 2.

It should be noted that *Heavey* rejected the challenge to Washington's blanket primary "for the same reason" that the Wisconsin Supreme Court rejected a challenge to Wisconsin's open presidential preference primary in *State ex rel. La Follette v. Democratic Party*, 93 Wis. 2d 473, 287 N.W.2d 519 (1980). *See Heavey*, 93 Wn.2d at 706 (Horowitz, J., concurring). Similar to *Heavey*, Wisconsin's Supreme Court found no substantial burden on the party's associational rights, and found a compelling state interest in "preserv[ing] the overall integrity of the electoral process by encouraging increased voter participation in the political process and by providing secrecy of the ballot." *La Follette*, 287 N.W.2d at 536; *compare with Heavey*, 93 Wn.2d at 705 (finding compelling state interests in "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary."). This Court's *La Follette* decision, reversing the Wisconsin Supreme Court, *see* 450 U.S. at 125 ("the interests advanced by the State do not justify its substantial intrusion into the associational freedom of members of the National Party"), applies equally to *Heavey*, rendering it questionable authority, at best.[7]

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[7] Washington's court has not passed on a primary election case since the *La Follette – Tashjian – Jones* line of cases, and there is no reason to assume that it would continue to adhere to its previous decision in light of later First Amendment developments.

Like Washington, Alaska previously justified its blanket primary as "ensuring that officers elected are representative of a broad cross-section of the electorate, rather than accountable to the narrower interests which may control a party organization." *O'Callaghan v. State*, 914 P.2d 1250, 1262 (Alaska 1996). Prior to the *Jones* decision, the Alaska Supreme Court followed Washington in finding its blanket primary to be constitutional.[8] *See id.*

In its petition, Washington notes the 1996 *O'Callaghan* decision, stating that "[t]he Alaska Supreme Court also upheld the form of blanket primary used in that state for many years." Petition at 7, n.5. The State fails to explicitly mention, however, that within two months of the *Jones* decision, the Alaska Supreme Court reversed itself in light of *Jones*: "Having reviewed *Jones*, we find no constitutionally significant differences between Alaska's primary election law and the California law declared unconstitutional in *Jones*. Nor do we find any principled basis for concluding that Alaska's blanket primary election statute remain constitutional in light of *Jones*." *O'Callaghan v. State*, 6 P.3d 728, 730 (Alaska 2000). Given the conflict between its earlier decision and the *Jones* decision, the Alaska court recognized that the Supremacy Clause required it to reverse the 1996 decision. *See id.*

As a final basis for seeking review, Washington contends that decisions of this Court conflict on the issue of its blanket primary. However, the State misrepresents the issue and this Court's decision in *Munro v. Socialist*

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[8] Washington and Alaska filed a joint *amicus curiae* brief in *Jones*.

Workers Party, 479 U.S. 189 (1986). *Munro* and *Jones* require no reconciliation, as they involve entirely separate and distinct issues. Washington "requires that a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the primary election before the candidate's name will be placed on the general election ballot." *Id.* at 190. The issue in *Munro* was not the blanket primary. The question was "whether [the 1% support requirement for minor party nominees to obtain access to the general election ballot] for statewide offices, violates the First and Fourteenth Amendments to the United States Constitution." *Id.* at 190-91. Whether a state may require a political party nominee to meet a minimal threshold of support among the voting public to warrant access to the general election ballot is an entirely different question from whether a state may force a political party to allow unaffiliated voters and members of competing political parties to select the party's representative in the general election. In no way can *Munro* be read as this Court's tacit approval of Washington's blanket primary.

CONCLUSION

This Court has already provided clear, consistent guidance on the limits of state power to compel political parties to include unaffiliated voters in selecting their nominees. A further opinion on this issue would provide no greater clarity. The Ninth Circuit clearly understood this Court's mandate, remanding the case "for entry of summary judgment, declaratory judgment, and an injunction in favor of the [political parties]." *Reed*, 343 F.3d at 1207. If the State seeks clarity for its officials in implementing the *Reed* decision, Petition at 18, n.15, it should look to the orders for summary judgment and

permanent injunction submitted by the political parties, not a confirming opinion from this Court.

RESPECTFULLY SUBMITTED this 30th day of December, 2003.

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